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No. 1235

In the
Supreme Court of the United States
OCTOBER TERM, 1966.

WILLIAM MARTIN and
PRINCE PARKER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court of the United States:

The petitioners, William Martin and Prince Parker, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the above Case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in

case No. 64 Cr. 438 was entered on December 21, 1965 and is not reported, but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed January 23, 1967, and is not yet reported, but is set forth in the Appendix hereto and in the certified copy of the record as number 15541 as of that date.

JURISDICTION

The date of the judgment to be reviewed is January 23, 1967. A petition for rehearing was denied by the United States Court of Appeals for the Seventh Circuit, March 9, 1967. The jurisdiction of this Court is invoked under 28, U.S.S., Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Was not your petitioners's right to a fair trial under the Constitution denied for the Court of Appeals to hold it was not reversible error for the trial court to permit evidence to go to the jury of hearsay conversations as related by a Government agent purportedly overheard by an eavesdropping device when the Illinois Supreme Court has held such practice a violation of State law?

2. Were not the instructions given by the trial court during the taking of evidence, and in its charge, as approved by the Court of Appeals, relating to the weight to be given hearsay evidence, in a joint trial error, and did this not deprive both petitioners of a fair trial?

STATEMENT OF THE CASE

Each of the petitioners, Martin and Parker, hereinafter sometimes referred to as defendants, were named in an indictment filed June 17, 1965 as No. 64 Cr. 438. It contained four counts naming both defendants in each count. Counts One and Two charged both defendants with the sale and possession of a narcotic drug on January 11, 1965. Counts Three and Four charged both defendants with the sale and possession of a narcotic drug on January 26, 1965. The case was tried to a jury which returned a verdict of guilty as to both defendants on all counts on November 9, 1965. On December 21, 1965, defendant Martin was sentenced to eight years in prison on each count, to run concurrently and defendant Parker to five years in prison on each count to run concurrently.

THE EVIDENCE

United States Narcotic Agent Turnbou testified (Tr. 20) that on January 11, 1965 he met with an informer, identified as Kathryn Bullock (Tr. 22) at a restaurant and then proceeded with her to 3564 So. Wells where they met defendant Martin. Money was given Martin for the purchase of narcotics and they were told to await a phone call from defendant Parker.

That he and the informer Bullock went to an apartment at 7515 So. Wentworth and that later when the telephone rang he told the informer he wanted to listen (Tr. 27-36, see App.). Over objection he was permitted to testify to the conversation. Later he and the informant met Parker and received the narcotics which are the subject matter of Counts One and Two.

Agent DeFauw testified that during the same afternoon he had observed defendant Martin leave 3564 So. Wells

and enter an apartment building at 308 66th Street, later identified as a building in which defendant Parker had an apartment.

Agent Turnbou also testified that on January 26, 1965 he and the informer Bullock went to the same building on Wells St. and delivered money to defendant Martin (Tr. 48). Later he listened to a telephone conversation at the informer's home and over objection identified defendant Parker as the person whose voice he heard when the informer received the call (Tr. 51, see App.). Shortly thereafter defendant Parker delivered to Agent Turnbou the narcotics which are the subject matter of Counts Three and Four.

Agent DeFauw testified (Tr. 130) that on the same date he observed Agent Turnbou and the informer Bullock go to 3564 So. Wells and enter the building. That shortly after they left defendant Martin left and proceeded to the apartment building at 308 66th St.

The defendants were arrested two months later and no narcotics or marked advance funds were found in their possession.

The trial Judge commented to the jury on hearsay evidence and its application to joint defendants at the time of the first telephone conversation (Tr. 33, see App.), and instructed the jury over objection on principal and agent and partnership in crime (Tr. 172, see App.).

STATUTES CONCERNED

Section 174, Title 21, U.S.C.A.

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in

any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000."

Section 4705 (a), Title 26, U.S.C.A.

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Article 14, Ilinois Criminal Code (1961), Section 14-1.

" '(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

" '(b) Eeavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article . . .'

Section 14-2.

"'A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device.'

Section 14-5.

Provides that any evidence obtained in violation of the Article is not admissible in any civil or criminal trial.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important federal question in a way in conflict with applicable decisions of this Court.

2. The Court of Appeals has departed from the accepted and usual course of judicial proceedings relative to hearsay testimony and has sanctioned such a departure by the District Court in violation of the petitioners' rights under the IV, VI and XIV Amendments to the Constitution so as to call an exercise of this Court's power of supervision.

3. We submit not merely that the Trial Court and the Court of Appeals erred in a question of law, *i.e.*, can federal agents violate state law with impunity in their investigations, but that their error creates legal problems of great importance in these times which requires review by the highest tribunal of the United States.

The arguments as to the prejudicial effect of the admission into evidence of the statements of defendant Martin out of the presence of defendant Parker and of Parker out of the presence of Martin are interwoven in both points the defendants urge in this petition.

The first point here presented urges that the Trial Court in permitting these conversations to go to the jury with his comments was error and that this error was compounded by the instruction given which only confused the issue. The second point, treated hereafter, relates to the eavesdropping in violation of law under the pretense of having received permission to "listen in."

The informer Bullock was not called by the Government to testify. This situation brings the circumstances squarely under the basis or reason for the hearsay rule. The rule excluding hearsay is based on the lack of opportunity to test by cross-examination the veracity and accuracy of the statement offered. The 7th Circuit recognized this rule and set it out in its opinion in *Globe Indemnity Co.* v. *McAvoy Co.*, 41 F.2d 122, at page 125:

> "The witness Shaw, who has been a director of appellee corporation continuously since 1904, and who, with his associates, has been general counsel and attorney for appellee during all of that time, was permitted to testify, over appellant's objection, that Ortseifen told Shaw that 'he never mentioned anything about a contract which he proposed to enter into with the Italian American Vineyard Company with respect to the purchase of some wines in California until after suit had been started against the company when I went to him about it. He then said something as to whether it was a company contract or a personal contract. * * * He said it was a personal matter which he expected to take care of; he said the institution of this lawsuit and such liability, if any, as might be incurred, if any was incurred by

the company, was a personal matter and he had signed the company's name.'

"Ortseifen was not called as a witness by either side. Whether there was good reason for not doing so is not shown, nor is it material, for in either event it would clearly be a violation of the rule against hearsay evidence, with no opportunity to appellant of cross-examination; and it was incompetent for the further reason that the statement was not made in the presence of appellant, and hence could not bind it. * * *"

This case was followed and the rule applicable was also discussed in *Superior Engraving Co.* v. *National Labor Rel. Bd.*, 183 F.2d 783 at page 794:

"The rule excluding hearsay is a basic rather than a technical rule. The reason for the rule is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having sufficient probative effect to raise an inference that the fact is as stated. 31 C.J.S., Evidence, § 193, P. 924. Our conclusion that the excluded statements constituted hearsay is, we think, fortified by *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55, 39 S.Ct. 38, 63 L.Ed. 123; *Bracken et al.* v. *Cato et al.*, 5 Cir., 54 F.2d 457; *Globe Indemnity Co.* v. *McAvoy Co.*, 7 Cir., 41 F.2d 122, certiorari denied 282 U.S. 884, 51 S.Ct. 87, 75 L.Ed. 780."

This testimony coming as it did from a narcotic agent, presumably trained to testify, set a pattern for the entire trial that prejudiced the petitioners in all subsequent events testified to.

When objection was made to hearsay testimony (Tr. 29, see App.) the Trial Court apparently sensing the dangerous area that was being explored undertook (Tr.

33, see App.) to instruct the jury as to how it was to treat this testimony. This the defendants contend was error which was compounded by the Trial Court's instruction to the jury relative to this testimony (Tr. 172,) (see App.)

The 7th Circuit in *United States* v. *Pronger,* 287 F.2d 498, was critical of a similar situation and in an opinion which is respectfully recommended to the Court in its entirety concluded by saying at page 500:

> "Whether intentional or not, we believe that the Court's remarks had the effect of telling the jury that the government had proved that the common design or common concept of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States,* 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350.

In this same area it is interesting to note that following the 7th Circuits' decisions in *United States* v. *Allegretti,* 340 F.2d 254, and *United States* v. *Baxa,* 340 F.2d 259, this Court after granting the petition for writ of certiorari in the *Baxa* case reversed and remanded the case on consideration of the confession of error by the Solicitor General, 381 U.S. 353, 14 L.Ed. 2d 681.

To further compound this error the Court of Appeals states in its opinion (AP. 6a) that no objection was made to the comments and instructions of the Trial Court. Nothing could be further from the fact. Counsel for the petitioners objected to all of the hearsay conversations on two grounds, their inadmissibility as hearsay and as a violation of state and federal law (AP. 8a-12a), and was granted a continuing objection.

As referred to in the Statement of Facts, Agent Turnbou was permitted to testify to conversations overheard by him received by the informer Bullock, allegedly from defendant Parker. The Trial Court permitted these conversations to go to the jury as an exception to the "hearsay rule" on the grounds that permission had been granted by the informer. This has to be a fiction too far fetched to be indulged in. This Court and all Courts know that an informer works under coercion and that even the slightest suggestion of an agent is taken as an order by a person in such a position.

Would the Court suggest that should the informer refuse permission, if it were sought, that the eavesdropping would not have taken place. The Court's attention is respectfully directed to *Laughlin* v. *United States,* 344 F.2d 187 at page 191, where the Court of Appeals in reversing a decision discusses the fiction of consent and distinguishes *Rathbun* v. *United States,* 355 U.S. 107.

This testimony was admitted contrary to law and public policy. This evidence was also obtained in contravention of Illinois state law. Supreme Court State of Illinois November, 1965, *People of the State of Illinois* v. *Marvin Kurth, et al.:* 34 Ill. 2d 387.

> "This issue of whether the recordings were properly admitted depends upon a construction of certain provisions of article 14 of the Criminal Code of 1961. Section 14-I provides as follows:
>
> " '(a) Eavedropping device.
>
> An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person; by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

" '(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article . . .'

"Section 14-2 provides as follows:

" 'A person commits eavesdropping when he: (a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or (b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device.'

"Section 14-5 provides that any evidence obtained in violation of the article is not admissible in any civil or criminal trial. It is undisputed that Smith, who was one of the parties to all of the recorded conversations, consented to the recording of these conversations, and the State contends that his consent alone is sufficient to make the recording admissible.

• • •

"Having in mind this expression of legislative intent, we believe that it is unreasonable to suppose that the legislature intended that the consent of the party who is surreptitiously recording the conversation of others can make the recorded conversations admissible against the other parties, who were unaware that their conversations were being recorded.

• • •

"It seems to us that the reasonable construction of the statute, which will insure the right of privacy, is that any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him.

• • •

"Since none of the other parties to the conversations had any knowledge that the conversations were

being recorded and did not consent to such recording, the recordings are inadmissible against them. To the extent that *People* v. *Dixon,* 22 Ill.2d 513 may be construed to hold to the contrary, it is overruled.

* * *

"Reversed and remanded."

With this decision the Illinois Supreme Court brings to life the guide lines for the admission of this type of evidence which is wholly improper as this Court pointed out in *Lopez* v. *United States,* 373 U.S. 427, at page 440:

"It is urged that whether or not the recording violated petitioner's constitutional rights, we should prevent its introduction in evidence in this federal trial in the exercise of our supervisory powers. But the court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised. Its application in the present case, *where there has been no manifestly improper conduct by federal officials,* would be wholly unwarranted.

"The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, *unless the manner in which it has been obtained—for example, by violating some statute or* rule of procedure —compels formulation of a rule excluding its introduction in a federal court." (Citing cases) (Emphasis added.)

The conclusion seems inescapable that in its broader view the analogy between eavesdropping and listening on extensions with coerced consent are part in parcel of the same condemned procedure. The petitioners were prejudiced by the admission of this evidence and the case should be reversed.

In its opinion the Seventh Circuit espouses a theory of law for the guidance of the District Courts of Illinois which if adopted would now condone federal agents being in criminal violation of state statutes in their investigative work.

In both *Elkins* v. *United States,* 364 U.S. 206 (1960) and *Rios* v. *United States,* 364 United States, 364 U.S. 253 (1960), this Court strongly indicates that that would be its position should the converse of the famous "silver platter" doctrine cases be presented now for review.

In this case the informer, unlike in *Rathbun* v. *United States,* 355 U.S. 107, cited by the Court in its opinion, did not testify. The opportunity for cross examination was not present and only the agent could be questioned concerning the objectivity of the consent to "listen in", if in fact this does now in view of the law after *People of the State of Illinois* v. *Kurth,* 34 Ill. 2d 387 became a material fact.

People v. *Dixon,* 22 Ill. 2d 513, upon which the habeas corpus hearing in *United States ex rel Dixon* v *Pate,* 7 Cir. (1964) 330 F.2d 126, 127-8 cert. den. 379 U.S. 891, was based and which in so far as Illinois law is concerned was specifically overruled in *Kurth supra* was also a telephone extension type case. One is strongly impelled to believe in view of the language in *Lopez* v. *United States,* 373 U.S. 427 (1963) that now that the State of Illinois has spoken on this problem, and the manner in which this evidence was obtained is in *violation of a statute or rule of procedure* the evidence should be excluded, and that this Court even though the eavesdropping complained of took place before the *Kurth* ruling should reverse and implement the intent of the Illinois legislature as interpreted by the Supreme Court of Illi-

nois. That this is the current feeling on the subject of eavesdropping is born out by the remarks of President Johnson in his recent State of the Union Address wherein he recommended to Congress that this practice be examined with the view of stamping it out by legislation.

Since Parker in both instances was the party initiating the call and therefore the "sender" we believe that this would be construed as within the policy annunciated by Justice Frankfurter in his dissent in the *Rathbun* case at pages 112 and 113.

Pertinent to this petition it is also thought are the comments of Justice Musmanno of the Supreme Court of Pennsylvania in *Commonwealth* v. *Murray*, 223 A. 2nd 102 (Supreme Court of Pennsylvania) wherein he discusses a similar Pennsylvania statute and distinguishes the Rathbun rationale.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. GORMAN
Attorney for the Petitioners

APPENDIX

OPINION

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 15541 SEPTEMBER TERM 1966—JANUARY SESSION 1967

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WILLIAM MARTIN and PRINCE PARKER, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 23, 1967

Before HASTINGS, *Chief Judge,* DUFFY, *Senior Circuit Judge* and KILEY, *Circuit Judge.*

DUFFY, *Senior Circuit Judge.* The indictment herein contained four counts. Counts 1 and 2 charged both defendants with the sale and possession of a narcotic drug on January 11, 1965. Counts 3 and 4 charged both defendants with the sale and possession of a narcotic drug on January 26, 1965. The jury returned a verdict of guilty as to both defendants on all counts. A judgment of conviction was entered.

United States narcotics agent Turnbou testified that on January 11, 1965, he and an informer, Kathryn Bullock, met at a restaurant and then proceeded to an address on South Wells Street in the City of Chicago where they met the defendant Martin in his apartment.

After some discussion as to the price of heroin, Turnbou gave Martin $625. Martin counted the money and then said "Go back to the house and wait for a phone call from Prince after it gets dark."

Agent Turnbou and Kathryn Bullock proceeded to her apartment on South Wentworth Street, Chicago. Turnbou told her he desired to listen to the expected telephone conversation. This was agreeable to Bullock and she showed Turnbou the location of the extension telephone.

Defendant Parker called and agent Turnbou, listening in on the extension phone, heard Parker say, "Hi, Bert, this is Prince. Meet me in about fifteen minutes at McDonald's on 71st Street."

Turnbou and Kathryn Bullock then proceeded by automobile to 71st Street and Vincennes where defendant Parker met them and stated "I've got the package and I am supposed to give it to Kathryn, Bert. Let's go to your house. I don't like the idea of sitting on the street in an automobile with an ounce on me. We can settle it there." The three then went to Kathryn Bullock's apartment where defendant Parker delivered 25.52 grams of heroin hydrochloride.

On January 26, 1965, agent Turnbou and Kathryn Bullock again met and conversed with defendant Martin at his apartment. Turnbou stated he wanted to obtain another ounce of heroin. Martin replied "Well, stuff is real scarce around here now, and the best I can do is $725 an ounce." Turnbou finally agreed to the price and handed Martin $725. Martin then directed them to "go home and wait for a call."

Turnbou and Bullock proceeded to her residence, and Turnbou again told her he wanted to listen to any telephone call which she received, to which Bullock agreed. *Parker called.* Turnbou, listening in on the extension phone, heard Parker say "Bert, meet me in half an hour at 63rd and Stewart." Turnbou and Bullock then proceeded by automobile to 63rd and Stewart where defen-

dant Parker handed Turnbou a clear plastic bag which contained 25.09 grams of heroin hydrochloride.

The principal point urged by appellants for reversal is an alleged error in the receipt in evidence of testimony by agent Turnbou as to conversations overheard on the telephone between defendant Parker and informer Bullock. It is further argued that permission to listen was not given by Bullock as a matter of law because she was working under coercion.

It is further argued that the information used was received in contravention of Illinois state law. Reliance is had on a decision of the Supreme Court of Illinois—*People of the State of Illinois* v. *Kurth* (1966), 34 Ill. 2d 387, 216 N.E. 2d 154.

In *Rathbun* v. *United States,* 355 U.S. 107 (1957), reh. den. 355 U.S. 925, the Supreme Court stated the issue in that case to be, page 107—"This case concerns the issue of whether the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation are admissible in federal court." [Footnote omitted] The decision was that such evidence is admissible.[1]

Before and since the decision in *Rathbun,* this Court has repeatedly held that testimony relating to telephone conversations overheard with the consent of a party thereto is admissible. *United States* v. *Kountis,* 7 Cir. (1965), 350 F.2d 869, 870, cert. den. 382 U.S. 980;[2] *United States* v. *Campbell,* 7 Cir., (1964), 337 F.2d 396, 398-9, cert. den. 379 U.S. 983; *United States ex rel Dixon* v. *Pate,* 7 Cir. (1964),

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[1] The Court noted that some courts had held that the consent of both parties was necessary, while other courts, including this Circuit, had ruled that the consent of one party was sufficient to make the testimony admissible. 355 U.S. at 109. The decision adopted the view that only one party to the conversation need consent to the overhearing.

[2] The cases designated with footnote 2 all involve conversations overheard on an extension telephone with the consent of one of the parties to such conversation.

330 F.2d 126, 127-8, cert. den. 379 U.S. 891;[2] *United States* v. *Williams*, 7 Cir. (1963), 311 F.2d 721, 725, cert. den. 374 U.S. 812; *United States* v. *Bookie*, 7 Cir. (1956), 229 F.2d 130, 132; *United States* v. *White*, 7 Cir. (1956), 228 F.2d 832, 834-5.[2]

There is no evidence in this record which would, in any way, indicate that informer Bullock was acting under coercion or duress. Any inference to the contrary is unwarranted on this record.

The cases cited, and others, have held that listening on an extension telephone with the consent of one of the parties is not a violation of Section 605 of the Federal Communications Act.[3]

We hold the District Court properly admitted the testimony of agent Turnbou relating conversations between defendant Parker and informer Bullock, because these conversations were listened to by agent Turnbou over an extension telephone with the consent of the informer Bullock.

Defendants strongly urge that present Illinois law as shown by *People* v. *Kurth, supra*, requires that the many prior decisions of our Court hereinbefore cited must be overruled or, at least, disregarded. We disagree!

Preliminarily, it may be noted that the evidence involving the listening to the telephone conversations between Parker and Bullock and the trial of the defendants, occurred prior to the decision of the Illinois Supreme Court in *Kurth*. To have any effect in the present case, we would be required to apply the decision retroactively. We do not reach that point. Furthermore, it is not clear from *Kurth*, which involved the admission of recordings, that the conduct here criticized did violate Article 14 of the Illinois Criminal Code. Again, we do not reach that point.

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[3] 47 U.S.C. § 605 provides that ". . . no person not being authorized by the sender shall intercept any such communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communications to any person; . . ."

Assuming *arguendo,* that the rule in *Kurth* does apply, and that Turnbou's activities were a violation of the Illinois statute, the question remains whether such evidence is inadmissible in a federal court because it was obtained in violation of state law. The answer is "No."

The admissibility of evidence in federal criminal prosecutions is governed by Rule 26, F.R.Cr.P., which provides ". . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This Rule does not make admissibility of evidence in federal courts dependent upon diverse state laws; rather, it seems to envision a uniform federal practice in all federal criminal cases.

A number of courts have held that a violation of state law does not affect admissibility of evidence in the federal courts. In *On Lee* v. *United States,* 343 U.S. 747 (1952), reh. den. 344 U.S. 848, a federal agent was permitted to testify about conversations he overheard between the defendant and an "undercover agent." The Supreme Court said, pages 754-55—"But here neither agent nor informer violated any federal law; and violation of state law, even had it been shown here, as it was not, would not render the evidence obtained inadmissible in federal courts. *Olmstead* v. *United States,* 277 U.S. 438, at 468."

Pertinent also is the statement of the Court in *Ferguson* v. *United States,* 10 Cir. (1962), 307 F.2d 787, vacated and remanded on other grounds on motion of the United States, 375 U.S. 962, where the Court said at page 790:

> "Both Congress and the Oklahoma legislature have indicated what those respective bodies consider necessary for the control of telephonic communications. Such legislation need not be in harmony, and may conflict . . . but the course of a federal criminal prosecution cannot be controlled by state law."

In a recent decision, *United States* v. *Jones,* ..... F.2d ....., (November 16, 1966), this Court had occasion to consider the claimed error in a criminal case that defendants were prejudiced by "evidence of conversations obtained through the use of an eavesdropping device, in violation of Illinois law. . . ." In an opinion written by Chief Judge Hastings, we held such evidence was admissible in the trial of a criminal case in the federal court.

The defendants also urge it was error to admit into evidence the statements of defendant Martin made out of the presence of defendant Parker, and statements of defendant Parker made out of the presence of defendant Martin. However, the jury was justified in finding beyond a reasonable doubt that the statements received in evidence were made in furtherance of or during a joint venture.

The instructions given by the trial court were properly limited so as not to suggest to the jury that there was a common plan or scheme. This distinguishes the instant case from *United States* v. *Pronger,* 7 Cir. (1961), 287 F.2d 498, 500, relied upon by defendants.

The defendants did not object to the comments and instructions of the trial court when the evidence was received, nor did they object to the final charge, nor did they request or tender any instructions on this issue. We hold the receipt of the statements made by defendants Martin and Parker respectively, was not error. *United States* v. *Furlong,* 7 Cir. (1952), 194 F.2d 1, 3, cert. den. 343 U.S. 950.

Finding no prejudicial error, the judgment of the District Court is

AFFIRMED.

Testimony of AGENT TURNBOU:

27 * * * Q. Directing your attention to approximately 5:15 in the afternoon of January 11, 1965, where were you at that time?

A. I was in the first floor apartment of Kathryn Bullock at 7515 South Wentworth.

28 Q. What if anything happened at that time?

A. The telephone rang.

Q. Did anyone answer the phone?

A. Yes.

Q. Who was that?

A. Kathryn Bullock answered the phone. I listened to the conversation on an extension telephone.

Q. Did you recognize the voice at the other end of the line at that time?

A. No, I did not.

Mr. Gorman: Objection to the question, if your Honor please; no foundation has been laid.

The Court: Objection is overruled. He is laying a foundation. The witness said he didn't recognize the voice.

Mr. Gorman: I was making the objection and I didn't hear him.

The Court: He just said that he didn't recognize the voice.

By Mr. Phelan:

Q. Had you ever heard that voice on a prior occasion to the best of your knowledge, Agent Turnbou?

29 At this time?

Q. At that time

A. No, I had not.

Q. Did you ever hear that voice subsequently?

A. Yes, I did.

Q. And did you ever see the person face to face whose voice that was?

A. Yes, I did.

Q. Did you recognize that later, at that face-to-face meeting, did you recognize the person whose voice that was as being the voice that you heard on this occasion?

A. Yes, I did.

Q. Whose voice was it?

A. Prince Parker's.

Q. What was the conversation that was had at that time?

Mr. Gorman: Objection, if your Honor please.

The Court: On what grounds, Mr. Gorman, that this was a type of wire tapping or something of this sort?

Mr. Gorman: No. 1, yes.

30 The Court: And what else?

Mr. Gorman: And No. 2 that it is hearsay, as to Martin, that is one objection.

The Court: Yes, he will explain that a little later.

Mr. Gorman: And my other objection is that it was a violation not only of the state law but of the federal law.

The Court: With respect to whether or not it is improper for an agent to listen in on a conversation of this kind, I think you will have to lay a better foundation with respect to whether or not there was a consent by either of the parties.

Absent that, Mr. Gorman is quite right. You do that first and then I will deal with the other question. If you can, I don't know.

You say you listened in on an extension phone in Kathryn Bullock's apartment?

The witness: Yes, I did.

By Mr. Phelan:

Q. Was that with the approval of Kathryn Bullock?

31 A. Yes, it was.

Mr. Gorman: Objection if the Court please.

The Court: No, overruled.

I think you had better tell us what the conversation was, rather than the conclusion that it was with her approval.

What happened when the phone rang?

The Witness: Pardon me, your Honor, do you want me to relate the conversation on the telephone?

The Court: No, relate the conversation which ended up with your going to an extension phone in some other room.

By the Witness:

A. Oh, well, on arrival—

Mr. Gorman: Pardon me, if your Honor please, if I may interject an objection to your Honor's question.

The Court: No, that is not hearsay, Mr. Gorman. That is necessary foundation, with respect to the issue of consent. You can never have consent established in the
32 absence of one of the defendants if we didn't have hearsay in there. That is one of the exceptions to hearsay.

Mr. Gorman: We have our objection?

The Court: You have your objection, right.

Go ahead.

By the Witness:

A. After I arrived at the apartment with Kathryn Bullock on the 11th, I told her that I wanted to listen to the telephone conversation that was expected, and that it was important that I did this.

Mr. Gorman: I object to that, if your Honor please.

The Court: No, objection overruled.

Mr. Gorman: We are only going into the question of consent.

The Court: Right. But this is how he got the consent.

Go ahead.

By the Witness:

A. She said that it was agreeable to her and she showed

me where the extension telephone was.

33 The Court: She showed you where the extension was?

By the Witness:

A. Yes.

The Court: You had not been there before?

By the Witness:

A. No, I had not.

The Court: Well, let me explain to the ladies and gentlemen of the jury.

This is not hocus-pocus. You know that it is illegal to tap a telephone or listen in on another person's conversation, except if one of the parties to the conversation consents to it. Then somebody else may listen in with the consent of one of the parties to that conversation.

So that is what we have been getting over here, as to whether or not there was such consent in this case.

With respect to Mr. Gorman's other objection, it applies also to that earlier conversation between Mr. Martin and Agent Turnbou, which he said, "Wait until Prince

34 calls at the house." You must understand that under our system of law only evidence as to what the particular defendant says or does is admissible against him. And if somebody else is not there—in other words, I cannot make somebody else a criminal by saying that he is going to do something or other to wait for him, or what have you. No can the other fellow make me a criminal by saying, he told me to call you or he told me to do this, that or the next thing.

Now, there is one exception to that and that is that if you conclude on the basis of what the evidence shows with respect to defendant A, that he was part of a joint venture or a business transaction with Defendant B, not from what B says, but from A says or does, that he was involved in a business transaction in which B was also involved. And you conclude that B was also in that transaction from what

he said or did, not from what A said or did. Then, like any partnership, in effect, each of them is responsible for
35 acts done in furtherance of that joint venture by the other.

And so each of them can then be held responsible for things said or done by the other member of the joint venture.

But until such time as you conclude, if you ever do, that on the basis of A's own statement that he was in business with B, and on the basis of B's own statement that he was in business with A, until that time you are to take into consideration against A only things that A says or does and against B only things that B says or does, and not to take into consideration against B something that A says B did or said, or take into consideration against A something that B says A said or did.

I think you understand that at this point.

Now, that was the basis of Mr. Gorman's objection as to the admissibility of this telephone conversation between Mr. Parker and Kathryn Bullock, which Mr. Turnbou was listening to with Miss Bullock's consent.

That is not admissible against Mr. Martin because
36 he was not there. It wasn't things that he was saying or doing, and it is not admissible against him unless you conclude, if you ever do, from things that Mr. Martin said or did, that he was in business with Mr. Parker, and vice versa.

All right, proceed.

By Mr. Phelan:

Q. Would you relate what the conversation was at that time, Agent Turnbou?

A. Mr. Parker said, Hi, Bert, this is Prince. Meet me in about 15 minutes at McDonald's on 71st Street.

Kathryn Bullock said, Okay.

• • •

37 * * * By Mr. Phelan:

Q. What happened then, Agent Turnbou?

A. We had a conversation?

Q. Who was present at that conversation

A. Kathryn Bullock, Prince Parker, and myself.

Q. Would you kindly relate what that conversation was?

Mr. Gorman: Will your Honor instruct the jury that this is not admissible as to the defendant Martin.

38 The Court: Yes, I don't think that I have to do this every time.

Mr. Gorman: Well, if I can have a standing objection, Judge.

The Court: Fine. Mr. Gorman properly objects to any consideration of a conversation between Mr. Parker and the agent as being applied against Mr. Martin until and unless you find, if you ever do, that they were in business together, from things that Mr. Martin said and did, and not from what Mr. Parker says about it.

This is something that you are going to have to keep in mind. It is not too difficult, but yet you have to be careful that you don't confuse testimony of one as against the other.

You have had some testimony about what Mr. Martin did at the South Parkway address. You now have some testimony as to what Mr. Parker is going to say and do at McDonald's at the Vincennes Street address. And the two cannot be mixed up as far as the guilt or innocence of each of the two gentlemen is concerned, unless you

39 find at some time or other that they were really in business together. And then you can take into consideration against one what the other one said and did and vice versa.

You have a standing objection, Mr. Gorman, and my ruling will be that it is granted, sustained, unless the jury

should conclude at some point that they were in business together, at which point they will determine its applicability.

Go ahead.

By Mr. Phelan:

Q. What was the conversation at that time, Agent Turnbou?

A. I said to Mr. Parker, did Willie send you?

And Parker said, I've got the package. And I am supposed to give it to Kathryn, Bert. I think he used the name Bert.

And he said, "Let's go to your house. I don't like the idea of sitting on the street in an automobile with an ounce on me. We can settle it there."

• • •

40-50 • • •

51 • • • Q. Would you kindly relate what that conversation was?

Mr. Gorman: There is an objection on behalf of Defendant Parker.

The Court: The jury understands that any conversation at which Mr. Parker was not present is not to be taken into consideration against him, unless and until and if they ultimately conclude that he and Mr. Martin were in business together from what Mr. Parker did and said, not
52 what Mr. Martin says, and vice versa.

• • •

53-171 • • •

172 • • • This is a case in which two persons are charged with the commission of a crime, and I want you to understand that the guilt of a defendant may be established without proof that each defendant did every act con-
173 stituting the offense. The statute provides that

"Whoever commits an offense against the United States or aids, abets, counsels, commends, induces or procures its commission is punishable as a principal. According-

ly every person who knowingly and willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and purposely and with some specific intent to fail to do some act which the law requires; that is to say, with bad purpose either to disobey or disregard the law."

Now you will recall that during the course of the trial certain testimony was received in evidence only as to one or the other of the defendants, and I instructed you that such evidence was not to be considered against the other defendant who wasn't present at the time the conversation took place or the act took place until or unless you
174 found from the evidence relating to the person who was present that he was a part of a joint venture with the other person, and if you find now beyond a reasonable doubt from all the evidence in the case that there was a common plan and both defendants were a part of it, then you may consider all of the acts and declarations of each of the defendants up to and including January 26, 1965, as evidence pertaining to both of them.

If you do not find, on the other hand, that there was a common plan or design, that they were working together beyond a reasonable doubt, you have to be satisfied of this, then you will consider the acts and declarations of each defendant only as to him and not as to the other defendant.

I think that is clear to you. We start out with the evidence being applicable only to the man who said it or did it and it is applicable to that defendant only. If you find that there was a common plan beyond a reasonable doubt, and that both of them were part of it in which event, like partners in business, they are responsible for each other's acts and statements.

Motion for New Trial—denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, January 23, 1967

Before
Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States
No. 15541 vs.	)	District Court
WILLIAM MARTIN and PRINCE PARKER,	)	for the Northern District of Illinois,
Defendants-Appellants,	)	Eastern Division

ORDER

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Thursday, March 9, 1967

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

UNITED STATES OF AMERICA,	)	Appeal from the
Plaintiff-Appellee,	)	United States
No. 15541 vs.	)	District Court
WILLIAM MARTIN and	)	for the Northern
PRINCE PARKER,	)	District of Illinois,
Defendants-Appellants,	)	Eastern Division

ORDER

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

Certificate of Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1235

WILLIAM MARTIN AND PRINCE PARKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 372 F. 2d 63.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1967. A petition for rehearing was denied on March 9, 1967 (Pet. App. 16a). The petition for a writ of certiorari was filed on April 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal narcotics agent, who monitored telephone conversations on an extension tele-

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phone with the consent of one party, was properly permitted to testify about those conversations at trial.

2. Whether the trial court's instructions regarding declarations of joint venturers was proper.

STATUTES INVOLVED

Article 14 of the Illinois Criminal Code of 1961, Ill. Stat. Ann., ch. 38, Art. 14 provides in pertinent part:

> § 14–1
>
> (a) Eavesdropping device
>
> An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; * * *.
>
> * * * * *
>
> § 14–2
>
> A person commits eavesdropping when he:
>
> (a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto * * *.
>
> * * * * *
>
> § 14–5
>
> Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial * * *.

STATEMENT

Each of the petitioners was convicted, after a jury trial in the United States District Court for the Northern District of Illinois, on a four-count indictment charging the sale of heroin in violation of 21

U.S.C. 174 and 26 U.S.C. 4705(a). On December 21, 1965, petitioner Martin was sentenced to imprisonment for eight years on each count, the terms to run concurrently, and petitioner Parker to five years on each count, the terms to run concurrently. The court of appeals affirmed.

The government's evidence (the sufficiency of which is not challenged here) showed that on January 11, 1965, narcotics agent Turnbou was introduced to petitioner Martin by an informer, Kathryn Bullock (Tr. 23–24).[1] Turnbou asked Martin for an ounce of heroin, and gave Martin $625 for that purpose. Martin then said: "Go back to the house and wait for a phone call from Prince [petitioner Parker] after it gets dark." Turnbou and the informer then returned to the latter's apartment (Tr. 26–27), where Turnbou told her that he wanted to listen to the telephone conversation which was expected. The informer said that was agreeable to her, and showed the agent to the extension telephone (Tr. 32–33). At 5:15 p.m., Parker called and said to the informer (with Turnbou listening on the extension): "Hi, Bert, this is Prince. Meet me in about 15 minutes at McDonald's on 71st Street" (Tr. 36). The three subsequently met, and Parker delivered 25.52 grams of heroin hydrochloride (Tr. 40, 156).

On January 26, Turnbou and Miss Bullock again met Martin. Turnbou gave Martin $725 this time, and Martin again told them to return to the informer's

[1] "Tr." designates the transcript of trial which we are lodging with the Clerk of this Court.

apartment and await a telephone call (Tr. 48–52). Turnbou had again obtained consent from Miss Bullock to listen on the extension telephone (Tr. 54–55). Parker called and said: "Bert, meet me in a half an hour at 63rd and Stewart" (Tr. 57). After they met, Parker handed 25.09 grams of heroin hydrochloride to Turnbou (Tr. 58, 157).

ARGUMENT

1. The trial court did not err in permitting Turnbou to testify as to the conversations between Parker and Miss Bullock which he overheard. An argument that his use of the extension telephone constituted a violation of Section 605 of the Federal Communications Act is precluded by *Rathbun* v. *United States*, 355 U.S. 107. Here, the record (*e.g.*, Tr. 32–33, 54–55) amply supports the findings of both courts below that Miss Bullock consented to the use of her regularly installed extension telephone. There is no evidence supporting petitioner's contention, raised first in the court below, that the informer was coerced into giving consent.[2]

Nor did Turnbou's action constitute a criminal offense under the Illinois eavesdropping statute (Article 14 of the Illinois Criminal Code of 1961), as asserted by petitioners (Pet. 10–14). As pointed out in

[2] Petitioners further suggest (Pet. 6) that the error was compounded by the fact that the informer did not also testify to the conversations. See the concurring opinion by the Chief Justice in *Lopez* v. *United States*, 373 U.S. 427, 441–446. We have been advised by the United States Attorney in Chicago that Miss Bullock died on March 21, 1965, some seven months prior to the trial of petitioners.

our brief in opposition in *Watkins* v. *United States,* pending on petition for certiorari, No. 976, this Term, that statute proscribes only the use of an eavesdropping device to hear a conversation "without the consent of any party thereto". Ill. Stat. Ann., ch. 38, § 14–2 (*supra,* p. 2). On March 24, 1966, more than a year after the monitoring herein challenged, and four months after petitioners' trial, the Illinois Supreme Court ruled that the eavesdropping statute prohibited the introduction of evidence against a person who had not consented to the monitoring. *People* v. *Kurth,* 34 Ill. 2d 387, 216 N.E. 2d 154. Contrary to petitioners' contention, however, the court did not hold that monitoring with the consent of only one party was in violation of the statute; it rejected this construction and held merely that the evidence so obtained was intended by the legislature to be admissible only against the consenter (216 N.E. 2d at 158). In these circumstances, there is no reason to consider the appropriateness of sanctions under this Court's supervisory authority (see *Lopez* v. *United States,* 373 U.S. 427, 440); the evidence so obtained is properly admissible in a federal criminal proceeding. *Wolfe* v. *United States,* 291 U.S. 7, 12–13; Rule 26, F.R. Crim. P. (see Pet. App. 5a–6a).

Turnbou's testimony about the overheard conversations was not in violation of the hearsay rule. These extra-judicial statements were admissible against Parker as admissions, and were admissible against Martin upon the basis of the showing that he was engaged in a joint venture with Parker. *United*

States v. *Olweiss*, 138 F. 2d 798, 799–800 (C.A. 2); *Fuentes* v. *United States*, 283 F. 2d 537, 539–540 (C.A. 9).

Nor was Turnbou's testimony that Miss Bullock consented to his use of her extension telephone hearsay evidence. Turnbou testified to what he heard Miss Bullock say, and petitioners had ample opportunity to cross-examine the agent to determine if Miss Bullock actually voiced her consent.

2. The trial court's instructions with respect to the use of declarations of joint venturers (Pet. App. 10–14) were proper in all respects. *United States* v. *Olweiss, supra; Fuentes* v. *United States, supra.* These instructions, given at various times during the trial and in the court's final charge, were clearly responsive to petitioners' hearsay objections. The jury was specifically charged that the declarations of one was admissible against the other alleged joint venturer only if they found a common scheme or plan (Pet. App. 10–11, 12–13, 14). The instructions thus did not have the effect of requiring the finding of a common scheme or plan. That a joint venture was actually in existence was plainly shown by ample evidence, however.

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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